

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNELL JAMAR JOYNER,

Defendant-Appellant.

UNPUBLISHED
February 13, 2014

No. 312108
Oakland Circuit Court
LC No. 2012-240421-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR ALEXANDER HUMPHREY,

Defendant-Appellant.

No. 312110
Oakland Circuit Court
LC No. 2012-240422-FC

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Following a joint trial before a single jury with the representation of a shared attorney, defendants Lonnell Joyner and Omar Humphrey were convicted of armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of felony, MCL 750.227b.¹ Defendants both contend that they were prejudiced by the joint representation and that the court deprived them of due process by failing to follow the procedures of MCR 6.005. While we agree that the court was remiss in its duties, defendants have established no prejudice affecting the outcome of the proceedings or that their attorney labored under an actual conflict of interest.

¹ Joyner was actually convicted of two counts of felony-firearm, but his sentences for those offenses were ordered to run concurrent to each other.

Defendants also challenge the sufficiency of the evidence supporting their convictions. As the evidence more than adequately supports that one of the defendants fired a handgun at the victim while the other aided and abetted in the offense, and that both defendants engaged in armed robbery, we discern no ground for reversal.

Finally, Humphrey challenges the scoring of two offense variables used to calculate his minimum sentencing guidelines range. Both scores were supported by a preponderance of the evidence and the trial court did not commit clear error. We therefore affirm.

I. BACKGROUND

Eric Patton, Humphrey and Joyner went to high school together. At the age of 20, Patton and Joyner reconnected at a gas station. The pair exchanged telephone numbers with the understanding that they would engage in future marijuana transactions. On January 11, 2012, Joyner contacted Patton and Patton agreed to sell him “a quarter” of marijuana for \$100. Patton drove to an apartment complex to meet Joyner. He parked his vehicle, but left the engine running. Shortly thereafter, Joyner and Humphrey approached and entered Patton’s vehicle. Joyner sat in the front passenger seat and Humphrey sat in the back. Patton noticed that both Joyner and Humphrey were armed with handguns. Joyner placed his weapon against Patton’s face, while Humphrey placed his weapon against the back of Patton’s head, and they demanded that Patton give them his money and other possessions. Patton gave the men approximately \$135 in cash and a quantity of marijuana that had been stored in his glove compartment. During the robbery, Humphrey pistol whipped Patton in the back of the head. Joyner thereafter searched the interior of the vehicle and Patton’s person and took Patton’s wallet from his pocket.

After completing his search, Joyner exited the vehicle. Patton immediately placed his vehicle in gear, accelerated rapidly, and fled the apartment complex. Patton believed that Humphrey was still inside the vehicle as he began to pull away, but Patton admitted that he was not certain about this fact or how Humphrey escaped the vehicle. Patton claimed that someone fired at least five shots in his direction as he fled. Patton discovered two bullet holes on the driver’s side of the rear window. The window shattered entirely, however, before police were able to inspect it. One bullet grazed Patton’s shoulder, leaving a wound approximately two inches long. Patton did not seek medical treatment, and secured the hole left by his shattered window with tape and plastic garbage bags.

Patton did not report the incident until the following day. Initially, Patton omitted mention that marijuana was involved in the incident. At his third witness interview, Patton stated that he had intended to purchase marijuana from Joyner. At a later interview, Patton finally disclosed that he had intended to sell, not purchase, marijuana. Patton provided a bullet to police, which he claimed to have found in his shirt on the day of the incident. He also turned over the shirt, which appeared to have been damaged by a bullet. No other physical evidence of the shooting was found. Besides Patton, no other witnesses were located. Moreover, emergency dispatch received no reports of a shooting at the time and place in question.

Throughout the lower court proceedings, Joyner and Humphrey were represented by the same retained attorney—Richard Taylor. Neither codefendant raised an objection to trial counsel’s joint representation. At trial, counsel argued that Patton was not credible, that the dearth of physical evidence presented did not adequately substantiate Patton’s testimony, and that, on the whole, the evidence was inadequate to prove that Joyner and Humphrey were guilty beyond a reasonable doubt. The jury believed Patton’s claims and convicted Joyner and Humphrey as charged. Joyner thereafter moved for a new trial, arguing that counsel’s joint representation caused a conflict of interest, rendering his performance constitutionally ineffective. The trial court denied the motion and defendants’ appeals followed. This Court consolidated the matters for consideration.

II. JOINT REPRESENTATION

Both defendants challenge the trial court’s failure to advise them of the dangers of joint representation. They also both contend that the joint representation led to a conflict of interest, resulting in ineffective assistance. While we agree that the circuit court breached its duty to defendants, we find the error harmless. Moreover, it appears that defendants engaged a purposeful strategy in proceeding with joint representation.

MCR 6.005(F) provides that the court must advise codefendants of the hazards of employing joint counsel:

Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

- (1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;
- (2) the defendants state on the record after the court’s inquiry and the lawyer’s statement, that they desire to proceed with the same lawyer; and
- (3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

If counsel subsequently discovers a conflict of interest in the joint representation, he must immediately notify the court. The court must also sua sponte “inquire into any potential conflict that becomes apparent, and take such action as the interests of justice require.” MCR 6.005(G).

The prosecution concedes on appeal that the circuit court failed to make the inquiry and record mandated by MCR 6.005(F). The record reveals no excuse for the trial court’s failure to follow this clear mandate. Yet, “[t]he failure to follow this court rule, in itself, does not constitute reversible error.” *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990). Rather, the defendant must establish that he received ineffective assistance of counsel, i.e. “[h]e must show that an actual conflict of interest existed and adversely affected the adequacy of his

representation.” *Id.* at 530. See also *People v Kirk*, 119 Mich App 599, 603-604; 326 NW2d 145 (1982) (holding that reversal is not required absent a showing of an actual conflict of interest where a trial court failed to comply with GCR 1973, 785.4[4], the predecessor to MCR 6.005[F]).

On appeal, both defendants claim that an actual conflict of interest rendered counsel’s performance constitutionally deficient. While only Joyner preserved his challenge by raising a motion for a new trial, his motion created an adequate record to review both defendants’ challenges to counsel’s performance. “A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court’s findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim.” *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011) (citations omitted). We review for an abuse of discretion the trial court’s decision whether to grant a new trial. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001).

“‘[T]he right to counsel is the right to the effective assistance of counsel.’” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). Generally, a defendant’s claim of ineffective assistance includes two components: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant also must overcome the strong presumptions that his “counsel’s conduct [fell] within the wide range of reasonable professional assistance,” and that counsel’s actions were sound trial strategy. *Id.* at 689.

However, in cases involving an alleged conflict of interest, a less stringent standard is employed. *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). Under this standard, “prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* at 557 (quotation marks and citations omitted). “Such a conflict is never presumed or implied;” the defendant must establish its existence. *Lafay*, 182 Mich App at 530. “[M]ultiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest,” and this is the defendant’s burden to establish. *Cuyler v Sullivan*, 446 US 335, 348; 100 S Ct 1708; 64 L Ed 2d 333 (1980).

Joyner contends that an actual conflict existed and negatively impacted counsel’s ability to represent him because, representing both defendants, counsel had to promote a unified defense simply discrediting the victim. Had defendants been represented by separate attorneys, Joyner continues, his counselor could have argued that Humphrey was the individual who shot at Patton’s vehicle as he drove away, thereby reducing Joyner’s culpability and possibly eliminating his assault with intent to murder conviction. In his appellate brief, Humphrey raises only a generalized claim of conflict. For purposes of our analysis, we will assume that Humphrey has the same complaint.

As is discussed in greater detail below, the evidence presented by the prosecutor supported Joyner's and Humphrey's assault convictions, regardless of who actually fired the gun. Simply put, someone fired a gun toward Patton's vehicle, shooting twice through his driver's side rear window and grazing his shoulder. And "under Michigan law, a defendant who intends to aid, abet, counsel, or procure the commission of a crime, is liable for that crime as well as the natural and probable consequences of that crime." *People v Robinson*, 475 Mich 1, 3; 715 NW2d 44 (2006). Joyner and Humphrey both intended to rob Patton at gunpoint. It naturally and probably follows that one or both of them would decide to use his weapon. Separate trial counsel would have provided Joyner no benefit had he argued that only Humphrey shot at the victim, and vice versa, because one who aids another in the commission of a crime may be convicted and punished as if he committed the crime himself.

Instead, trial counsel pursued a much stronger defense, attacking Patton's credibility and arguing that the crime either did not occur or that neither Joyner nor Humphrey were involved. This unified front was the only potential method to secure acquittal of either defendant. As noted by Justice Frankfurter in his dissent to *Glasser v United States*, 315 US 60, 92; 62 S Ct 457; 86 L Ed 680 (1942), "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." Counsel pursued that defense vigorously. Neither Joyner nor Humphrey has demonstrated an actual conflict of interest that adversely affected trial counsel's performance. Accordingly, reversal is not warranted.

III. SUFFICIENCY OF THE EVIDENCE

Joyner challenges the sufficiency of the evidence supporting his assault conviction. Specifically, Joyner contends that the prosecutor presented insufficient evidence that he possessed intent to murder. Humphrey more generally challenges the evidence supporting his assault and armed robbery convictions.

Challenges to the sufficiency of the evidence are reviewed de novo to determine if any rational trier of fact could determine that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012). All conflicts in the evidence are resolved in favor of the prosecution. *Id.* "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). On appeal, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

"The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (quotation marks and citation omitted). The elements of armed robbery are:

- (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous

weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

The prosecutor proceeded below as if one defendant actively committed the offenses and the other aided and abetted. Michigan's aiding and abetting statute, MCL 767.39, provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Three elements must be satisfied for a conviction under an aiding and abetting theory:

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*Robinson*, 475 Mich at 6 (quotation marks and citations omitted).]

Criminal liability is not limited to only those crimes that a defendant intends to aid and abet. *Id.* at 7. A conviction is appropriate where "the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, . . . the charged offense was a natural and probable consequence of the commission of the intended offense." *Id.* at 15.

The prosecutor presented sufficient evidence to establish beyond a reasonable doubt that defendants committed armed robbery. Patton testified that both men placed a gun to his head. While Patton claimed that only Joyner collected his valuables, the men worked together to accomplish their joint objective. Patton's testimony standing alone was sufficient to establish the elements of armed robbery in relation to Joyner and at least aiding and abetting that crime in relation to Humphrey. See *People v Richards*, 76 Mich App 695, 698; 256 NW2d 793 (1977) ("Unsupported eyewitness testimony, if believed by the trier of fact, is sufficient to convict."). We may not interfere with the jury's assessment of Patton's credibility in this regard. *Kanaan*, 278 Mich App at 619.

The prosecutor also presented sufficient evidence that defendants committed assault with intent to murder. Two assaults were actually committed according to Patton's testimony: Humphrey hit him in the head with a gun and either Joyner or Humphrey fired five shots toward his fleeing vehicle. Only the shooting likely could have resulted in death, making it the only assault relevant to this offense.

There was sufficient evidence to prove beyond a reasonable doubt that the shooting occurred. Again, Patton's testimony would be sufficient proof if believed by the jury. Patton also produced a spent bullet and his bullet-damaged shirt. Patton had a graze wound on his shoulder and claimed that his broken car window was caused by gunfire.

Contrary to defendant's challenges, it is irrelevant who actually fired the weapon. Patton believed that only Joyner had exited the vehicle in time to fire the shots. Regardless of whether Joyner or Humphrey fired the rounds, the other aided and abetted in the commission of the crime. The men both came armed and ready to rob Patton. The men acted together when threatening Patton and relieving him of his money and marijuana. It is a "natural and probable consequence" of any armed offense that shots may be fired. Such a natural result happened here and both defendants are equally culpable for it.

Contrary to Joyner's contention, there was also sufficient evidence of defendants' "actual intent to kill." "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence [of intent] is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); see also *Ericksen*, 288 Mich App at 196-197.

The requisite intent may be gleaned from the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, [the defendant's] conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Brown*, 267 Mich App 141, 149 n 5; 703 NW2d 230 (2005) (quotations and citations omitted).]

Based upon Patton's testimony and testing of the bullet, the assault was committed with a handgun, a naturally deadly weapon. Five or more bullets were fired at Patton's vehicle. Two of these bullets struck the rear driver's side window. As Patton was sitting in the driver's seat, it is reasonable to infer that the shooter aimed at him. One of these bullets grazed Patton's left shoulder, just inches from his neck and head. From this evidence, a rational juror could infer that the shooter intended to kill the victim.

IV. SCORING OF HUMPHREY'S OFFENSE VARIABLES

Humphrey also challenges the trial court's scoring of offense variables (OV) 3 and 6 in calculating his sentence. Our Supreme Court recently clarified the standard of review applicable to a defendant's challenge to the trial court's sentencing guidelines determinations in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013):

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.

Humphrey asserts that the court erroneously scored 25 rather than 10 points for OV 6, reflecting that he intended to kill rather than simply injure the victim. As MCL 777.36(1) provides:

[OV] 6 is the offender's intent to kill or injure another individual. Score [OV] 6 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result..... 25 points

(c) The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life..... 10 points

Under MCL 777.36(2)(a), "[t]he sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury."

Here, Humphrey was convicted of assault with intent to murder. One element of that offense is that the assault was committed with the intent to kill. *Ericksen*, 288 Mich App at 195-196. The trial court was required to score OV 6 in a manner consistent with the jury verdict and therefore correctly scored 25 points for this variable.

Humphrey also contends that he was entitled to a lower score for OV 3 as Patton's injury was relatively minor. MCL 777.33 governs the scoring of OV 3, in relevant part, as follows:

(1) [OV] 3 is physical injury to a victim. Score [OV] 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(d) Bodily injury requiring medical treatment occurred to a victim 10 points

(e) Bodily injury not requiring medical treatment occurred to a victim 5 points

* * *

(3) As used in this section, "requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment.

Patton suffered a graze wound to his shoulder during the shooting. He also experienced swelling to the back of his head as a result of being pistol whipped. While Patton did not seek out medical attention for either injury, the trial court did not clearly err in determining that

medical treatment was actually required under the circumstances. The court heard the testimony regarding Patton's injuries and made a considered judgment based on that evidence. We will not interfere with that assessment.

We affirm.

/s/ Elizabeth L. Gleicher

/s/ Henry William Saad

/s/ Karen M. Fort Hood